A

RE ENDON TAMSERAN; EX P PARKASH SINGH WASAWA SINGH

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
B [BANKRUPTCY NO: 29-399-1993
25 FEBRUARY 2009

BANKRUPTCY: *Certificate of discharge - Issuance of - Order prohibiting issuance of certificate expiring - Applicant's application seeking extension of said prohibitory order - Whether prohibitory order incapable of being extended beyond two years provided by s. 33B(6)(b) Bankruptcy Act 1967 - Whether KP JIM exercised discretionary powers under s. 33A(1) Bankruptcy Act 1967 - Whether court has no business interfering with KP's exercise - Whether no purpose served to prolong bankrupt's bankruptcy*

C

D

BANKRUPTCY: *Prohibitory order - Extension of - Application for - Application for extension of order prohibiting issuance of certificate of discharge - Whether prohibitory order incapable of being extended beyond two years provided by s. 33B(6)(b) Bankruptcy Act 1967 - Whether KP JIM exercised discretionary powers under s. 33A(1) Bankruptcy Act 1967 - Whether court has no business interfering with KP's exercise - Whether no purpose served to prolong bankrupt's bankruptcy*

E

A receiving order (RO) and adjudicating order (AO) were issued
F against the judgment debtor ('the bankrupt') on account of her failure to comply with the bankruptcy notice issued by the applicant/judgment creditor ('the applicant') and served upon her. The Ketua Pengarah Jabatan Insolvensi Malaysia ('KP JIM') was appointed as the receiver of the bankrupt's assets. Subsequently,
G the KP JIM purportedly exercised his discretion under s. 33A(1) of the Bankruptcy Act 1967 ('the Act') to issue a certificate of discharge to discharge the bankrupt of her bankruptcy on the grounds that she was 65 years old; all her assets had been realized; there were no longer any more contribution to the estate
H and that the case was not moving any further. Pursuant thereto, the KP JIM issued a notice to creditors of intention to issue a certificate of discharge, a requirement under r. 194(B) of the Bankruptcy Rules 1969 ('Rules'). The applicant objected to the issuance of the said certificate and accordingly filed his notice of
I creditor's objection under r. 194C of the same. However, the applicant's objection was rejected by the KP JIM. Aggrieved, the applicant proceeded to file encl. 20 for an order prohibiting the

KP JIM from issuing the said certificate of discharge but was dismissed by the senior assistant registrar. Upon appeal to the Judge in Chambers, the applicant's appeal was allowed. The KP JIM was prohibited from issuing the certificate of discharging the bankrupt of her bankruptcy for a period of two years from the date the order was made. This prohibition was to expire on 7 November 2007. On account of the same, the applicant filed the present encl. 44 to seek an extension of the said prohibitory order for another two years to end on 7 November 2009 grounded upon the provisions of s. 93(4) of the Act and r. 275 of the Rules. Additionally, the applicant also invoked the provision of O. 92 r. 4 of the Rules of the High Court 1980 ('RHC') for the removal of doubt as may be necessary to prevent injustice. The issue that arose was whether the court was conferred with the powers to issue an order prohibiting the KP JIM from issuing a certificate of discharge exceeding the period of two years as provided by s. 33B(6)(b) of the Act.

Held (dismissing applicant's application (encl. 44) with costs):

(1) The said prohibitory order was incapable of being extended beyond the period of two years as provided by the said subsection 6(b) of s. 33B. It was the court's duty to obey and give effect to the meaning of the words of the statute as the said words were clear, unambiguous and explicit enough. The applicant's reliance on the provisions of s. 93(4) of the Act and r. 275 of the Rules was irrelevant and obviously misplaced for the said provisions clearly related to extension of time on procedural matters in the administration of the Bankruptcy Act and the formal manner in which the proceedings therein were to be conducted where time was involved, in particular where the time for doing any act or thing was limited for one reason or another; whereas s. 33B(6)(b) of the Act involved substantive provision of law conferring specific powers to the court over a specific issue involving the rights of the bankrupt for a discharge at the behest of the KP JIM and the exercise of the KP's discretionary powers under s. 33A(1) of the Act. (para 11)

(2) The KP JIM purportedly exercised his discretionary powers under s. 33A(1) of the Act to discharge the bankrupt of her bankruptcy. Here, the KP's powers was also unfettered, subject only to the rights of the creditors to object. He was guided by his standard Departmental Guidelines. The only fetter was offered by the court's powers to suspend the discharge or issuance of the two certificate of discharge for a period not exceeding two years. Beyond those two years, the matter was back in the hands of the KP JIM. He was at liberty to issue the certificate of discharge if he so wished. This court had no business to interfere with this exercise by the KP. (para 13)

(3) In the exercise of its powers under s. 33A(1) of the Act, the KP JIM was under no obligation to give reasons for so doing. However, in this case the KP gave all his reasons for wanting to discharge the bankrupt of her bankruptcy. It was perfectly within his discretion to do so and he was equally entitled to exercise his discretion to issue the certificate of discharge on those grounds. On the uncontroverted facts it would serve no purpose whatsoever to prolong the bankrupt's bankruptcy any further. (para 14)

Case(s) referred to:

Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 ***(refd)***

Kumpulan Kemuning Sdn Bhd v. Rajoo & Ors [1983] 2 MLJ 400 ***(refd)***

Re Ah Kang [1994] 2 CLJ 738 HC ***(refd)***

Re Ng Lei Wat; Official Assignee v. Housing and Development Board [1996] 3 SLR 106 ***(refd)***

Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 15, 16, 33A(1), 33B(6)(b), 73(1)(e), 93(4)
Bankruptcy Rules 1969, rr. 194B, 194C, 275
Rules of the High Court 1980, O. 92 r. 4

For the applicant - Shahruddin Osman; M/s Shahruddin Osman & Co
For the Insolvency Department - Nazry Dakeran

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JC:

[1] On 15 February 1994 a receiving order (R.O) and adjudicating order (A.O) were issued against the judgment debtor (Endon binti Tamseran, hereinafter referred to as the "bankrupt") on account of her failure to comply with the bankruptcy notice issued by the applicant/judgment creditor (hereinafter referred to as the "applicant") and served upon her on 22 July 1993. The amount, interest and cost due under the judgment obtained by the applicant on 19 September 1988 in Batu Pahat Magistrate Court Summons No. 82-144-1988 stated in the said notice amounted to RM13,437.46. Consequently the Ketua Pengarah, Jabatan Insolvensi Malaysia (hereinafter referred to as the "KP JIM") was appointed as the receiver of the bankrupt's assets.

[2] On 1 August 2003 the KP JIM purportedly exercised his discretion under s. 33A(1) of the Bankruptcy Act 1967 (herein after referred to as the "Act") to issue a certificate of discharge to discharge the bankrupt of her bankruptcy on the grounds that she is now 65 years old; all her assets has been realised; there were no longer any more contribution to the estate and that the case is not moving any further.

[3] Pursuant thereto, the KP JIM on 4 November 2003, issued Notice to Creditors of Intention to Issue a Certificate of Discharge, a requirement under r. 194B of the Bankruptcy Rules 1969 (herein after referred to as the "Rules") (see exh. PSWS01 of encl. 20). The applicant objected to the issuance of the said certificate and accordingly filed his Notice of Creditor's Objection under r. 194C of the same on 24 November 2003 (see exh. PSWS02 of encl. 20). However the applicant's objection was rejected by the KP JIM on 2 August 2004 *vide* their letter dated the same instant (see exh. PSWS03 of encl. 20).

[4] Being aggrieved by the said rejection, on 27 August 2004, the applicant proceeded to file his Saman Dalam Kamar (encl. 20) for an order prohibiting the KP JIM from issuing the said certificate of discharge. This application was heard by the learned senior assistant registrar and was dismissed. Upon appeal to the judge in chambers, the applicant's appeal was allowed. The KP JIM was prohibited from issuing the certificate discharging the

bankrupt of her bankruptcy for a period of two years from the date the order was made (for ease of reference hereinafter referred to as the "prohibitory order") ie, 8 November 2005 (see order as per encl. 41). This prohibition is to expire on 7 November 2007.

[5] On account of the same, the applicant filed the present Saman Dalam Kamar (encl. 44) on 6 November 2007 to seek an extension of the said prohibitory order (encl. 41) for another two years to end on 7 November 2009, grounded upon the provisions of s. 93(4) of the Act and r. 275 of the Rules. Additionally the applicant also invoked the provision of O. 92 r. 4 of the Rules of the High Court 1980 (hereinafter referred to as the "RHC") for the removal of doubt as may be necessary to prevent injustice.

[6] In support of the application, it was the contention of the applicant that ever since the judgment debtor was adjudged a bankrupt and even after the prohibitory order (encl. 41) was given, KP JIM had failed all along to furnish him with relevant information in respect of the management of the assets of the bankrupt. The requirements under ss. 15, 16 and 73(1)(e) of the Act were also not complied and observed. The bankrupt's statement of affairs and financial position were also not brought to his knowledge and up to date he has yet to receive a single sum from the estate of the bankrupt.

[7] Nevertheless not withstanding the lamentable position of the applicant, in my view the crux of the matter lies singularly over the issue of whether the court is conferred with the powers to issue an order prohibiting the KP JIM from issuing a certificate of discharge exceeding the period of two years as provided by s. 33B(6)(b) of the Act. I think the answer is in the negative.

[8] The relevant provisions of the Act is as follows:

33B

(1) ...

(2) ...

(3) ...

(4) A creditor who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty-one days of being informed by the Director General of Insolvency that his objection has been rejected, make an application to court for an order prohibiting the Director General of Insolvency from issuing a certificate of discharge.

(5) ...

(6) On an application made under subsection (4), the court may, if it thinks it just and expedient:

(a) dismiss the application;

(b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

[9] The said subsection (6) uses the word "may" in respect of the orders that the court can make on the application. As such it is meant to be applied in a permissive sense – see *Re Ng Lei Wat; Official Assignee v. Housing and Development Board* [1996] 3 SLR 106. It is also about the conferment of discretionary powers to the court and its exercise therein. The exercise of such powers by the court is obviously unfettered. The court if it thinks it just and expedicent may or may not issue the prohibitory order against the KP JIM. Should the court decide to issue the prohibitory order, the court may issue the order for any period of time but not exceeding two years. There the court's discretion is halted.

[10] The words in s. 33B(6)(b) are clear and unambiguous, carrying a plain ordinary meaning. The words therein reflected the intention of the legislature. In such event it warrants the adoption of the literal approach to the interpretation of the section (see *Kumpulan Kemuning Sdn Bhd v. Rajoo and 200 Ors* [1983] 2 MLJ 400 and *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC). The function of the court is to give effect to the said legislative intent and not taking over the role of the legislature by stretching it further and further beyond the expression intended by the legislature or assigning a different meaning of the clear terms of the statute. Thus Higgin J in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* [1920] 28 CLR 129 at pp 161-162 stated:

> The fundamental rule of interpretation which all others are subordinate is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[11] Coming back to the matter presently before me, in my view it is very plain that the said prohibitory order (encl. 41) is incapable of being extended beyond the period of two years as provided by the said subsection 6(b) of s. 33B. It is the court's duty to obey and give effect to the meaning of the said words of the statute as the said words are clear, unambiguous and explicit enough. The applicant's reliance on the provisions of s. 93(4) of the Act and r. 275 of the Rules is irrelevant and obviously misplaced for the said provisions clearly relates to extension of time on procedural matters in the administration of the Bankruptcy Act and the formal manner in which the proceedings therein are to be conducted where time is involved, in particular where the time for doing any act or thing is limited for one reason or another; whereas s. 33B(6)(b) of the Act involves substantive provision of law conferring specific powers to the court over a specific issue involving the rights of the bankrupt for a discharge at the behest of the KP JIM and the exercise of the KP's discretionary powers under s. 33A(1) of the Act.

[12] In his Saman Dalam Kamar – encl. 44, the applicant in para 2, also applied "... menghapuskan keraguan sebagaimana yang perlu untuk mencegah ketidakadilan sepertimana peruntukan dibawah A. 92 k. 4, Kaedah-Kaedah Mahkamah Tinggi 1980 ..." However learned counsel makes no submissions over this prayer. Hence I took it as an abandonment of the said prayer. Nevertheless I don't see in what manner O. 92 r. 4 of RHC is relevant in this proceedings as there is no lacuna in the laws applicable here to warrant the invoking of the said O. 92 r. 4 by the court.

[13] In this case the KP JIM purportedly exercised his discretionary powers under s. 33A(1) of the Act to discharge the bankrupt of her bankruptcy. Here the KP's powers is also unfettered, subject only to the rights of the creditors to object. He is guided by his standard Departmental Guidelines. The only fetter

is offered by the court's powers to suspend the discharge or issuance of the certificate of discharge for a period not exceeding two years. Beyond that two years the matter is back in the hands of the KP JIM. He is now at liberty to issue the certificate of discharge if he so wished. At this stage the court now has no business to interfere with this exercise by the KP.

[14] In the exercise of its powers under s. 33A(1) of the Act, the KP JIM is under no obligation to give reasons for so doing. However, in this case the KP gave all his reasons for wanting to discharge the bankrupt of her bankruptcy. It is perfectly within his discretion to do so and he is equally entitled to exercise his discretion to issue the certificate of discharge on those grounds. She was about 65 years old at the time PSWS01 was issued by the KP JIM on 4 November 2003. By now she would have been 70 years old. In a nutshell, on the uncontroverted facts it would serve no purpose whatsoever to prolong the bankrupt's bankruptcy any further. In the words of His Lordship Abdul Aziz bin Mohamad J (as he then was) in *Re Ah Kang* [1994] 2 CLJ 738 at p. 740:

> Pada pendapat saya adalah bertentangan dengan kepentingan awam sekiranya seseorang itu terus kekal sebagai seorang bankrap sedangkan keadaan itu tidak memberi guna kepada sesiapa.

I am on all fours with the views expressed therein.

[15] For the reasons given, the applicant's application *vide* saman dalam kamar – Encl. 44 is herein dismissed with costs.